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DECISIONS

REBEL ARCHIVES
WITHDRAWN OF

HON. JAMES D. HALYBURTON,

JUDGE OF THE CONFEDERATE STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA,

IN THE CASES OF

JOHN B. LANE AND JOHN H. LEFTWICH,

IN RELATION TO THEIR

EXEMPTION, AS MAIL CONTRACTORS, FROM THE PERFORMANCE
OF MILITARY SERVICE.

RICHMOND:

RITCHIE & DUNNAVANT, PRINTERS.

1864.

DECISIONS

OF THE
HON. JAMES C. HAYWARD

IN THE
COURT OF COMMON PLEAS

IN THE
CITY OF NEW YORK

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EX Parte Lane—HABEAS CORPUS.

The return to the writ in this case states that Lane is a volunteer in the Provisional Army of the Confederate States of America, a member of Company B, of the 18th battalion of Virginia volunteers, and that he is detained for duty under the orders of Captain Fallen.

To this return the petitioner replies that he is a contractor for the transportation of the Confederate States mails, on Route No. 2521, between Keswick Depot and Columbia, in the State of Virginia, and that the route is thirty-one miles and a half in length, and that he is exempt from military service by virtue of the act of Congress approved on the 14th of April 1863, and entitled "An act to exempt contractors for carrying mails of the Confederate States, and the drivers of post coaches and hacks, from military service;" which act is in these words:

"The Congress of the Confederate States of America do enact, That the contractors for carrying the mails of the Confederate States shall be exempt from the performance of military duty in the armies of the Confederate States from and after the passage of this act, during the time they are such contractors: provided, &c.

"Sec. 2. That drivers of post coaches and hacks for carrying the mails on all routes where the weight of the mails requires that they should be carried in coaches or hacks, shall be exempt from military service in the armies of the Confederate States from and after the passage of this act, so long as they continue to be employed as drivers: provided," &c.

It is said by the counsel for Captain Fallen that the act above referred to does not discharge persons who were in service at the time when the contract was made, but only extends to those who had entered into contracts before their enrolment: that if Congress had meant to release those who were already in service, the word *discharged* would have been used, and not the word *exempt*; which, it is said, is inappropriate in such a case.

The word "exempt," however, is not a technical term. It does not bear in a statute a different construction from that which belongs to it in common speech; and the lexical definition of the word, along with other meanings, is, "free from any service, charge, burden, tax, duty," and so forth; "not liable to." If, then, it were meant to release or discharge from service a soldier who is already in service, it would be not only an intelligible, but a correct, expression, to say that he should *hereafter* be "exempt" from duty; that is to say, free from duty or service.

If Congress had meant that the act to which we have referred should

extend to men in actual service alone, they might perhaps, and probably would have used the word "discharged," instead of "exempt." If, however, they intended that the law should embrace not only persons in service, but others not enrolled, the word "discharged" from service would have been inapplicable; nor does it occur to me that they could have so well expressed their meaning, in such a case, by any other word as by the word "exempt," without a periphrasis.

It is further said, that to construe the exemption act as applicable to soldiers who were in service at the time when their contracts were made, would be to give it a retrospective operation; which is inadmissible, because retrospective laws, if not unconstitutional, are odious; and no law is to be so construed without express words or declaration plain of the legislature to that effect. I apprehend, however, that the proposition that retrospective laws are odious, when stated without qualification, is untrue. It depends on circumstances whether they are odious or not.

Retrospective laws, which deprive a party, against or without his consent, of a right which he had acquired by contract or otherwise, under former laws, are indeed generally unjust as well as odious; but those which operate upon the remedy merely, or which do not take away or modify any *vested right*, against the will of the party interested, are not so; and no presumption whatever is to be made against them.

In the case before the court, if the law should be regarded as extending to persons already in service, those persons would have no right to complain, and certainly would not complain, because they would not be obliged to become contractors, and to leave the service, unless they should desire to do so; and the government would have a perfect right to pass a law, and surrender its claim to the services of such persons, if it chose to do so. Whether it has so chosen or not, we must ascertain from the language of the law, construing it upon the same principles as any other law.

But how is the law in question retrospective, if it be applicable to men already in service?

Why, only in this, that it in that case releases men from an obligation they were under before the passage of the law, or before their contracts were made. In this sense it is retrospective, whether it be construed to embrace men in service or not.

We are obliged by its plain letter to extend it to men not enrolled, who were previously liable to enrolment. We are compelled to admit that such persons may exonerate themselves, by contracting to carry the mail, from their *previous obligation* to perform military duty; and, therefore, we cannot possibly avoid giving to it a retrospective operation, in the sense in which that word was used in the argument of this case.

Again: Suppose the President were, by and with the advice and consent of the Senate, to appoint a soldier to a judicial office, or to a secretaryship of state or of war: is there any doubt that he would *ipso facto*

be discharged from service as a soldier? We understood the very learned and able counsel who argued the case against the petitioner, to concede that he would be; and if so, it must be because former exemption acts declare that judges and other officers are exempted from service in the armies of the Confederate States. Then, we must give to these acts the same sort of retrospective operation which would be given to the act of April 1863, if the construction for which the petitioner contends be correct.

There can be no doubt that if a soldier in actual service can make a valid contract to carry the mail, he must be thereafter exempt from military service, under the act of the 14th April 1863.

Can such a soldier make such a contract?

There is nothing in the act just mentioned, or in any other act of congress, to prohibit him from doing so.

It is said to be incredible that Congress should grant the great boon of exemption from military service to a soldier in the army, because he may be a contractor to carry the mail, or, perchance, merely the driver of a mail coach; yet Congress has granted, beyond all controversy, that very boon, for that very consideration, to persons liable to military service, *before enrolment*.

If a man, however young, and vigorous, and active, and healthy, should, before he is actually enrolled, make a contract to carry the mail, it is admitted that he is thereafter exempt from military duty.

He might be better fitted to perform the duties of a soldier than any man in the Confederate army. He might be a veteran, distinguished for his valor on many a battle field; and yet, if he should choose to make a contract for carrying the mail, for a cent a year, he would be exempt from military service.

What great difference can it make, so far as the value of his services to the Confederacy is concerned, whether he enters into the contract the moment before he is enrolled, or the moment after?

But it is said that a soldier cannot be discharged from the army without certain forms and ceremonies.

That rule, however, is applicable only to cases where the party is required by law to remain in service *until he is so discharged*—not to any case in which a party is unlawfully held in service.

It is the practice of every day to discharge minors, without requiring them to obtain regular discharges from their officers. The same course may be pursued with reference to men beyond the military age.

In such cases, the court simply declares the party who may be confined, to be at liberty to go where he pleases, and imprisons for contempt the party disregarding the order.

For the reasons stated, I am of opinion that the petitioner is exempt from military service; and it is accordingly ordered that he be released from custody.

John H. Leftwich

v.

Major T. G. Peyton.

HABEAS CORPUS.

The petitioner prays to be discharged from custody, because he is a contractor to carry the mail of the Confederate States from Monticello to Macon, in Georgia—a distance of forty-five miles.

His contract was made on the 27th day of May 1864, since the passage of the act of 1864, entitled “An act to organize forces to serve during the war,” and he is between eighteen and forty-five years of age.

The question to be decided is, whether a person who has entered into a contract to carry the mail, since the passage of the act aforesaid, is exempted or not from service in the army, under the act of April 14th, 1863, entitled “An act to exempt contractors for carrying the mails of the Confederate States, and the drivers of post coaches and hacks, *from military service*,” taken in connection with the 6th clause of the 10th section of the act of 1864 aforesaid.

A very similar question arose and was decided by me in Lane’s case. The reasons for the decision in that case were given in my opinion then pronounced, and I do not mean to repeat them here, or to add much to them.

The case now before me was argued with much learning, research and ability, and I listened to the argument with pleasure and attention. It did not, however, convince me that the decision in the case of Lane was wrong; and still less did it tend to satisfy me that the prisoner in this case ought to be remanded.

Without instituting a critical enquiry into the various significations of the word “exempt,” and taking the term in the sense in which it is commonly understood, by the learned and the unlearned, in books and in ordinary discourse, in the halls of legislation and elsewhere, it may safely be assumed, that when Congress declares that mail contractors shall be “*exempt from the performance of military duty*,” it cannot mean less than this, that such contractors shall be free from the performance of such duty; shall not be liable to it; shall not be required to perform it.

It is true, that if it could be shown that Congress did not mean what, as it seems to me, it has plainly said, the court would be guided by the intention of Congress, and not by the language of the act; but, in that case, it would be necessary to demonstrate that intention clearly, and

beyond all reasonable doubt. That, I think, has not been done in this case.

Reference was made to several acts of Congress, to prove that the term "exempted" or "exempt" is never used where Congress intended to set free from service those who are actually in it: that, in such cases the word "discharged" is always adopted.

The most cursory examination of the acts cited will show that this is a mistake.

The first exemption act (the act of the 21st of April 1862, entitled "An act to exempt certain persons from *enrolment* for service in the armies of the Confederate States") provides that "all persons carrying the mails, all ferrymen on post routes," and a number of other classes of persons therein mentioned, shall be "*exempted* from military service in the armies of the Confederate States." There is no room for doubt, then, that, under that act, mail carriers, who had become such *before* their *enrolment*, were not liable to enrolment, or to military service after its passage. Yet, the conscription act of 1862 authorized the President to call out and place *in service* all white men who were residents of the Confederate States, between the ages of eighteen and thirty-five, and those persons were as truly *in service* after the call of the President, and before their enrolment, as they were afterwards, and when they were actually serving in the field.

They were "exempted," however, in the language of the exemption act, "from military service in the armies of the Confederate States," though they may have been in it when put upon the list of conscripts by the enrolling officer.

Again: The exemption act of the 11th of October 1862, provides, "that all persons who shall be held unfit for military service in the field, by reason of bodily or mental incapacity or imbecility, under rules *to be* prescribed by the Secretary of War, are hereby *exempted* from military service." How can there be a doubt that persons who were at that moment serving in the army, were, under that act, entitled to exemption from the time when they should be held to be unfit for military service in the field?

The conscription act, approved on the 17th of February 1864, places *in the service, from its passage*, all white men, residents of the Confederate States, between the ages of seventeen and fifty.

That act, therefore, places forthwith *in military service* all State and Confederate judges, and all other State and Confederate officers, who may be between the ages of seventeen and fifty years, except "the Vice-President of the Confederate States, the members and officers of Congress and of the several State Legislatures, and such other Confederate and State officers as the President or the Governors of the respective States *may certify* to be necessary for the proper administration of the Confederate or State governments, as the case may be;" all of whom are ex-

empted by the second clause of the tenth section of this act. Now, as the classes of State officers and Confederate officers not named were placed *in service* by the act, and were lawfully *in service* until the certificate of the President or the Governor of a State could be obtained, it is plain that the term "exempted" is here applied to persons who at the time were in the military service.

It was insisted, however, that if Congress had meant to take persons out of the service, who were already in it, they would have provided for the *discharge* of such persons, as well as for their *exemption*. They have not done so, however, in the cases already mentioned, and in a vast number of *analogous* cases.

Congress must have foreseen that many exempted persons, who ought not to have been enrolled, would, nevertheless, probably be enrolled, either by accident, or carelessness, or design, and they must have intended that, in those cases at least, the enrolled persons should be discharged from service. Yet they have made no provision for such cases, because, in legal contemplation, a discharge is the necessary consequence of an exemption: and if the military tribunals do not discharge them when their right to an exemption and discharge has been discovered, they may be discharged by *habeas corpus*. So all persons who are *over* the military age, or *under* that age, who may be, unwittingly or otherwise, enrolled and placed in service, are entitled to an immediate discharge; yet there is no legal provision on the subject.

Why Congress have not chosen to provide for the discharge of these persons, as well as for the discharge of persons elected to any of the offices mentioned in the act of April 2d, 1863, entitled "An act to authorize the discharge of certain civil officers from the military service of the Confederate States," I do not know. All I know is, that they have not chosen to do so.

It was said, also, that the policy of Congress, declared upon the face of the conscription act, was to keep the army, then existing, in the service, and that it is not, therefore, to be presumed that they would, in a short time afterwards, have taken out of the service any who were at that time in it; but the very act which sets out with that declaration, also declares that after the expiration of ninety days, all who are in service, under the age of eighteen, may leave it; or at least, shall not be compelled to remain.

If it be the policy of our government to increase the number of soldiers in our army, it is also its policy to increase the number of bidders for contracts to carry the mail.

At one time the act to exempt mail contractors was repealed; but afterwards, as we know, the Postmaster General stated, in a communication to the President, the great difficulty he found in obtaining contracts to carry the mail, and Congress afterwards passed the act of April 14th, 1863, exempting mail contractors from military service. It is not, then,

reasonable, as it seems to me, to suppose that Congress meant to exclude as bidders for these contracts all persons fit for the army, between the ages of 18 and 45; and still less reasonable would it be to presume that they meant, by the act of 17th February 1864 (which continues in force the exemption act of 1863, in relation to mail contractors), to exclude from the class of bidders all between seventeen and fifty years of age.

The *argumentum ab inconvenienti* was pressed upon the court, and it was said that the mischief would be incalculable, if every blacksmith, and shoemaker, and mechanic of every kind, were allowed to leave the army.

I do not perceive, however, that the principle upon which Lane's case was decided could lead to this consequence.

From the time when a man is put in the army he cannot well be "engaged habitually" in any mechanical employment, "working for the public." He has no right to leave the army, or neglect his duties as a soldier for that purpose; and, if he were to do so, could found no right to exemption upon his wrongful act. The government has a right to his services for every moment of his time after he has entered the army, and we cannot suppose that the case of a man acquiring a trade or resuming his employment as a mechanic, after being placed in military service, was in the contemplation of Congress. For this, and other reasons which might be given, I think that the Supreme Court of North Carolina was right, in the case *cited and relied upon* by the counsel for the enrolling officer, or for Major Peyton, in this case, in saying that no person is "embraced by the provisions of the exemption act of April 1862, so as to be entitled to exemption as a shoemaker, tanner, &c., who was, at the date of its passage, in the army as a soldier—that is, who had been placed in the military service of the Confederate States in the field;" and I have heretofore, if I remember, decided the same point in the same way, and gone further than the court did in that case.

The case of the mail contractor, however, in my view, is widely different from that of the mechanic.

An officer or soldier in the army has a perfect right to make a mail contract. He would have had that right if the exemption act had never existed, and would continue to have it if the act were struck out of existence to-morrow. If he were to make such a contract, he would be bound by it, and might cause it to be executed—that is to say, might fulfill it perfectly, through the agency of others; though he would not be likely to undertake it, unless for a most extravagant and unreasonable compensation. It would not be at all incompatible, or inconsistent, in a legal point of view, with his duties as an officer or a soldier, for him to do so; and the moment he made the contract, he would become one of the class to which the exemption law is applicable. His exemption would not be founded upon an unlawful act. He would become exempt in consequence of having done that which he had a clear right to do, and which Congress has declared shall exempt him.

That the Chief Justice of the Supreme Court of North Carolina did not think there was any inconsistency between the principle decided in Guyer's case, in which he delivered the opinion of the court, and the case of Lane, delivered by me, is manifest from the opinion delivered by him in the case of Bradshaw, in February 1864.

What purports to be a complete copy of that opinion, in a North Carolina newspaper, is before me, and from it, it appears that Bradshaw was a constable in April 1863, and was enrolled and sent to a camp of instruction: that in May 1863 Congress passed an act declaring that "in addition to the state officers exempted by the act of the 1st October 1862, there shall be exempted all State officers whom the Governor of any State may claim to have exempted for the due administration of the government and the laws thereof," &c.; and that Governor Vance, on the 9th of May 1863, claimed to have exempted "constables who had entered into bond previous to the 11th May 1863." Upon this state of facts, the Chief Justice decided that the constable, though he had been rightly held in service up to that time, was exempt from that time.

He says: "I can see no ground to except from the operation of the statute State officers who were in the military service. If such was the intention, a proviso to that effect would have been made; and there is no rule of law under which it can be made by construction. I am, therefore, of opinion that the petitioner is exempted.

"It was said in the argument, that the exemption should be made by implication, from the use of the words 'shall be exempted;' and it was said that the word 'exempted' is restricted in its meaning to persons who are not in the military service; and 'discharged' is the proper word when referring to persons who are in the military service. This distinction may obtain in military circles; but the word 'to exempt' is not a technical term—it is a plain English word, and means literally 'to take out or from;' and its ordinary signification is 'to free from, and not be subject to' any service or burden to which others are made liable: as, to exempt from military service; to exempt from taxation; and it is a settled rule of construction, that words in a statute are to be construed according to their ordinary meaning, unless there is something to show they are used in a different sense. The court cannot expect Congress to take notice of the military parlance, and require, in order to express the intention, that all the State officers whom the Governor may claim as necessary, &c., shall be free from military service, that this particular mode of expression shall be adopted, to wit: 'All State officers not in the military service shall be *exempted*, and all who are in the military service shall be *discharged*, whom the Governor may claim as necessary, &c.' The meaning, as expressed by the act of Congress, to exempt all State officers, is clear, and the words used to express the intention are appropriate, according to their well known interpretation."

Afterwards he says: "My conclusion is also supported by the decision

of Judge Halyburton, of the District Court of the Confederate States, in the matter of Lane, where it was held, that a soldier who became a mail contractor is embraced by the act of 14th of April 1863, and is exempted from military service; and by the decision of Judge Meredith, in the matter of Bunting, which I noticed briefly referred to in a newspaper, where it is held, that a soldier, who, while in the service, was elected a justice of the peace, and regularly qualified as such, is exempted."

It may be worthy of note that the first exemption act of April 21st, 1862, is entitled "An act to exempt certain persons from *enrolment* for service in the armies of the Confederate States;" while the act of 14th April 1863 is entitled "An act to exempt contractors for carrying the mails of the Confederate States, and the drivers of post coaches and hacks, from *military service*."

I am still of opinion that the case of Lane was rightly decided; but the case at bar stands upon a footing materially different from that of Lane.

The sixth clause of the tenth section of the act of the 17th of February 1864, entitled "An act to organize forces to serve during the war," provides that nothing contained in that act "shall be construed as repealing the act approved April 14th, 1863, entitled 'An act to exempt contractors for carrying the mails of the Confederate States, and the drivers of post coaches and hacks, from military service: provided, that the exemptions granted under this act shall only continue whilst the persons exempted are actually engaged in their respective pursuits or occupations.'"

When this act of 1864 was passed, the case of Lane, and many other cases to the same effect, had been decided by me, establishing the principle, so far as decisions of this court could do so, that persons who were in the military service of the Confederacy became exempt from that service upon entering into contract for carrying the mail, and were consequently entitled forthwith to a discharge. Several cases in the Circuit Court of this city, and some, I believe, in other courts of this State, were decided in the same way.

It is to be presumed, and indeed can hardly be doubted, that Congress knew that the courts had so decided.

The President had called upon the Secretary of War for information as to the course pursued by the Department of War in relation to mail contractors. What the courts had decided, as well as what the War Department had done, was stated by the Secretary to the President, and was probably made known by him to Congress, in answer to a resolution of enquiry, which had been passed by that body.

Under these circumstances, I regard the action of Congress as ratifying the construction which, up to that time, had been placed on the exemption act by all the courts of Virginia which had spoken on the subject, and was not opposed by the decision of any court elsewhere that I have heard of. If there had been any such decision, it would no doubt

have been produced by the learned counsel who argued this case so elaborately and so well against the prisoner.

The current of judicial decisions upon this subject appears to have been, at that time, uniform and unbroken.

If the construction given, as above mentioned, to the exemption act, and under which a considerable number of persons had been discharged from service in the armies of the Confederacy, had been contrary to the intention of Congress in passing the act; or, at least, if the Congress which passed the act of 1864 had not designed to allow the interpretation which had been given by the courts to this act to stand without change, it is very difficult, if not impossible, to believe that they would have expressly continued in force the act of 1863, without any alteration whatever.

Congress had no reason for presuming that the courts would reverse a settled course of decision, or for doubting that men would be discharged after the passage of the act of 1864, as they had been discharged before.

If this action of the courts had been disapproved by them, they would probably have manifested their disapprobation by changing the language of the law.

Two decisions entitled to great respect—one by the Court of Appeals of this State, and the other by the Circuit Court at Petersburg—were cited as adverse to my decision in the case of Lane; but as these decisions were subsequent to the conscription act of 1864, they were not known to Congress at the time of its enactment of that law, and could not, of course, have had any influence upon it.

A letter was read at the bar, from the Secretary of War to the President, in which the Secretary states that the War Department did not regard mail contractors, who had made contracts after their enrolment, as entitled to a discharge from the army; and, therefore, they were not discharged, except under a writ of *habeas corpus*; stating, at the same time, *that obedience was always paid to the writ, and the party who obtained it discharged, when it was so ordered by the courts.*

Whether this letter was ever submitted to Congress, or not, I do not know; but, if it were, we certainly cannot infer from that fact that Congress intended to arrest, or to justify any interference with, the action of the courts, by their omission to change the phraseology of the law.

We have already seen that Congress has not thought fit to order the discharge of exempt persons, in many cases where they are clearly entitled to it, but has left them to their remedy by *habeas corpus*, if the army officers will not voluntarily discharge them.

So with reference to mail contractors. Congress may have thought it best to leave their cases to be disposed of, as they have been heretofore, and to be investigated and decided by the courts, when the officers of the army shall not think it proper to discharge them, either because the contract may not have been proved, or for some other reason.

In addition to what has been said, it is certainly a consideration entitled to much weight, that many individuals may have entered into contracts for carrying the mails for a small, or merely nominal pecuniary compensation, believing that they would thereby be exempt from military duty, and induced to believe so by the decisions of the courts to which reference has been made.

Those persons are now bound by their contracts, and cannot escape from the obligation.

Their case would be one of much hardship, if they were now compelled to perform their contracts, and the whole consideration for which they undertook to perform them taken away.

Many of them might, in this way, be subject to ruinous losses; because they might be absolutely unable to comply with their contracts, without giving to them their personal attention, and thus obliged to pay the penalty for non-performance, without receiving any remuneration whatever.

If the law be clear against them, this consideration could, of course, have no weight; but it would not be right for the courts, unless the point be clear, to bring about such a result, by reversing a series of decisions, any more than it would be right to shake titles to lands, by departing from a settled course of decisions, upon grounds not entirely satisfactory.

One of the counsel who argued this case against the petitioner, remarked, if I understood him correctly, that he found it difficult to conceive how a man who had once entered the military service of the country, could ever get out of it without a regular and formal discharge by some military officer, as directed by the articles of war.

But there is no magic in the fact that a man is in military service. No charmed circle is thereby drawn around him, which no civil court or civil officer can approach.

No court has ever refused, so far as I am informed, to discharge a person brought up under a writ of *habeas corpus*, and who could show that, by reason of infancy or old age, or any other ground of exemption, he was illegally detained in service, upon the ground that the military authorities alone could discharge him. The moment it is shown that a person is entitled to exemption, and is *illegally detained* in service, whether he was put in it lawfully at first, or unlawfully, he has a right to be discharged, under the great remedial writ of *habeas corpus*. The question in these cases is not how a person got into the service, but whether he is legally detained there or not.

He may have enlisted voluntarily, for a certain and limited time, or he may have rightly been placed there for a definite period; but in either case, when the time for which he is bound to serve has expired, if he be still retained in the service against his will, he may be discharged, under the writ of *habeas corpus*, by the courts, if the military authorities will not discharge him.

So, if after he has entered the army, an act of Congress be passed declaring that he shall be exempt from service, and no longer be held there, the courts may discharge him.

I am of opinion that, in this case, the prisoner is entitled to relief, and he will be discharged accordingly.

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